SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 15

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ROBERT O'MELIA,

Plaintiff,

Index No. 652151/2016
Motion Seq. No. 002
ORDER AND DECISION

- against -

ACQUISITION AMERICA I, LLC,

Defendants.

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Melissa Crane, J.S.C.,

This action involves a landlord-tenant dispute. Plaintiff, Robert O'Melia, is a tenant residing in a residential apartment building defendant Acquisition America I, LLC owns. In his complaint, plaintiff asserts various causes of action, including, among others, a first cause of action seeking a declaratory judgment that he is entitled to have a second roommate. In its amended answer, defendant asserts, among other things, a second affirmative defense, pursuant to section 235-f (3) of the Real Property Law (RPL), that plaintiff is entitled to only one roommate, as well as a first counterclaim seeking a declaration that plaintiff is entitled to have only one roommate at a time because the lease for the subject apartment listed only one tenant.

By this motion (sequence number 002), defendant seeks an order granting it summary judgment, pursuant to CPLR 3212, dismissing the complaint's first cause of action insofar as it seeks a declaration that plaintiff is entitled to a second roommate, and with respect to defendant's second affirmative defense and first counterclaim, declaring that plaintiff is entitled to have only one roommate at a time. For the reasons stated below, defendant's motion is granted to the extent set forth herein.

BACKGROUND

Plaintiff's complaint (NYSCEF #1) alleges that defendant's apartment building, located at 680 West End Avenue, New York City, has more than six residential units, and there are apartments in the building subject to rent control or rent stabilization (Complaint, ¶¶ 5-6). The complaint also alleges that plaintiff and his family moved into apartment 2A (Apartment) pursuant to a lease (Lease) in December 1959, that his family continued to occupy the Apartment for approximately 58 years, and that plaintiff himself resided in the Apartment for approximately 40 of those 58 years (*id,* ¶¶ 7-8). The complaint further alleges that, from at least 2003 to the present, defendant has communicated solely with plaintiff and accepted rent in his name. Thus, plaintiff argues, defendant has accepted or created a tenancy in plaintiff's name (*id.*, ¶ 12). The complaint's first cause of action seeks a declaratory judgment that plaintiff is the lawful tenant of the Apartment by virtue of succession rights, either as the son of his parents or as the brother to his brother John O'Melia (John), and that he is entitled to have a second roommate (*id.*, ¶¶ 16-18).

In its amended answer (NYSCEF #27), defendant acknowledges that plaintiff is entitled to succession rights to the rent-controlled Apartment. The amended answer also contains, among other things, a second affirmative defense that, under RPL §235-f (3), plaintiff is only entitled to one roommate because the Lease contained only the name of his mother, and under the first counterclaim, defendant seeks a declaration that plaintiff is entitled to only one roommate at a time. By this motion (NYSCEF #29), defendant seeks an order granting it summary judgment dismissing the complaint's first cause of action to the extent it seeks a declaration that plaintiff is

entitled to two roommates, and as to defendant's second affirmative defense and first counterclaim, declaring that plaintiff is entitled to have only one roommate at a time.

In support of its motion, defendant submitted an opening brief (NYSCEF #32) and an affirmation of counsel along with various exhibits (NYSCEF #30-40). In response, plaintiff submitted an affirmation of counsel in opposition with exhibits (NYSCEF #43-45). In reply, defendant submitted an affirmation of counsel (NYSCEF #46) and an affidavit of Fadil Hodzic, defendant's superintendent for the building (Hodzic affidavit, NYSCEF #47). Oral argument on the motion was held on or about April 12, 2018.

APPLICABLE LEGAL STANDARDS

In setting forth the standards for considering a summary judgment motion, pursuant to CPLR 3212, the Court of Appeals has noted the following:

> "As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (internal citations omitted)"

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant must tender evidence to show the absence of any disputed material issues of fact to warrant the court, as a matter of law, in directing summary judgment (*Gammons v City of New York*, 24 NY3d 562, 569 [2014]).

The courts scrutinize summary judgment motions, as well as the facts and circumstances of each case, to determine whether relief may be granted, because entry of summary judgment "deprives the litigant of his day in court[,] it is considered a drastic remedy which should only be

employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion" (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Also, the Court has held that bare allegations or conclusory assertions are insufficient to create genuine issues of fact necessary to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On the other hand, "[w]here different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]), and conflicting inferences require a denial of the summary judgment motion (*Jaffe v Davis*, 214 AD2d 330, 330 [1st Dept 1995]).

ANALYSIS

In support of the motion, defendant relies on section 235-f of the RPL, commonly known as the "Roommate Law," that provides, in relevant part, where there is only one tenant on a residential lease, that lease "shall be construed to permit occupancy by the tenant, immediate family of the tenant, one additional occupant, and dependent children of the occupant, provided that the tenant or the tenant's spouse occupies the premises as his primary residence" (RPL § 235-f [3]). In turn, the statute defines an "occupant" to mean "a person, other than a tenant or a member of a tenant's immediate family, occupying a premises with the consent of the tenant" (RPL § 235-f [1][b]). Also, defendant produces, as documentary evidence, a copy of the Lease to show that it was only signed by Mrs. John O'Melia, plaintiff's mother, in 1964 (NYSCEF #38).

Plaintiff does not dispute the authenticity of the Lease, but contends that after his parents died, his brother (John) succeeded to their parents' rights under the Lease, and that he also should have been awarded rights of succession as a tenant when both were occupying the

Apartment as their primary residence (NYSCEF #43, ¶ 13). Thus, plaintiff argues that there should have been "two named tenants" on the Lease, that would entitle him to have a second roommate (*id.*).

In reply, defendant explains that "rent controlled tenants do not enter into lease agreements with their landlord after their initial lease" because they are "statutory tenants," and thus, there was no new lease entered into with plaintiff's brother (John) when he succeeded to the parents' rights to the Apartment (NYSCEF #46, ¶ 8). Defendant also maintains that, even though more than four people had once lived in the Apartment, as plaintiff claims, they were members of his immediate family (parents and siblings) and were not considered occupants or roommates. Accordingly, the restrictions of the statute do not apply to them (*id.*, ¶ 10).

Also, plaintiff acknowledges that this brother (John) has been living in a nursing home in New Orleans after their parents and other siblings had passed away, and that one roommate has been living in the Apartment (NYSCEF #44, ¶¶ 5 and 8). Whether John currently resides in the Apartment as his "primary residence" is irrelevant, because plaintiff's seeks succession rights either as the son of his parents or as the brother of John (complaint, ¶ 17). Thus, plaintiff's new argument raised in the opposition brief (NYSCEF #43, ¶ 13), that there should have been "two named tenants" on the Lease, contradicts the relief sought in the complaint and has no merit.

Plaintiff also argues, that under the Housing Maintenance Code §27-2075 (a) (1), which specifies that each person residing in an apartment must have 80 square feet of living space, the Apartment can "comfortably" accommodate more than two people and, thus, having "a third person as a second roommate would be well within the parameters of the housing code as well as within [his] rights" (NYSCEF # 43, ¶ 14). However, plaintiff cites no legal authority that the

Housing Maintenance Code overrides or supersedes the provisions of the RPL or Roommate Law. Therefore, his argument is unsubstantiated and unavailing.

Finally, plaintiff argues that he requires a second roommate due to his medical condition (NYSCEF #43, ¶ 15). He submits a letter from his doctor, stating that, because of his condition -- prostate cancer for which he underwent prostatectomy in 2014 and has been undergoing radiation treatment -- he "requires a live-in assistant to aid him with his daily chores and to accompany him to his medical appointments" (NYSCEF #45). Notably, plaintiff has not requested a reasonable accommodation based on his medical condition. Noor has be cited any legal authority for the proposition that the court can ignore the governing statute for cause, such as medical reasons. Moreover, because the doctor's letter was written several years ago, in 2015, it may or may not reflect plaintiff's current medical status.

On the other hand, defendant raises these issues and remarks: (1) plaintiff was well enough to travel to New Orleans to visit his brother despite his claimed medical condition, as his affidavit was signed and notarized in Louisiana; and (2) if plaintiff needs a live-in aide, why can the aide not be the one roommate to which he is entitled, and the other roommates be told to vacate the Apartment (NYSCEF #46, ¶ 12). As for the second issue, defendant submits the Hodzic affidavit, which states that, based upon Hodzic's personal observation and discussions with the persons involved, the Apartment is currently occupied by a "married couple living in one of the [three] bedrooms," a "single woman living in another of the bedrooms," the "third bedroom appears to be an office," and plaintiff "sleeps in what is [called] the maid's room on those occasions when he is in New York" (NYSCEF #47, ¶¶ 4-5). During oral argument on this motion, plaintiff's counsel did not address the first issue, and as to the second issue, he did not proffer any opposing affidavit or testimony. Instead, counsel flatly disputed defendant's multiple

occupants assertion and requested a hearing on the issue of "who is occupying the premises right now" (hearing transcript at 7). When questioned by the court about the number of roommates currently living in the Apartment, counsel responded: "I believe the one roommate, and we are looking to get access to the medical care person" (*id.* at 8).

With respect to a motion for summary judgment, after the movant (defendant in this case) has made a prima facie case in support of the motion, the burden shifts to the party opposing the motion (plaintiff in this case) by producing sufficient evidentiary proof in admissible form to establish the existence of disputed facts which requires a trial (*Alvarez*, 68 NY2d at 324). Here, plaintiff failed to present any evidentiary proof to rebut defendant's proffered evidence, and his counsel's conclusory assertions were insufficient to create issues of fact necessary to defeat defendant's summary judgment motion (*Zuckerman*, 49 NY2d at 562).

Indeed, plaintiff has neither produced evidence to rebut the fact that only his mother signed the Lease. Nor has he cited any legal authority to refute the statutory provision that the tenant is entitled to only "one additional occupant" when only one tenant signs the lease, as well as the requirement that the tenant must occupy the premises as his "primary residence." Plaintiff's failure militates against the relief he seeks in the complaint's first cause of action, namely, a declaratory judgment that he is entitled to have a second roommate.

While the court is fully aware that the legislative intent underlying the Roommate Law is not to "restrict the existing rights of tenants and occupants" (*Capital Holding Co. v Stavrolakes*, 242 AD2d 240, 243 [1st Dept 1997], *affd* 92 NY2d 1009 [1998]), the appellate court also stated that its ruling in *Capital Holding* does not "restrict landlords from setting reasonable occupancy limitations in leases, or prevent them from enforcing such lease provisions, so long as they do not violate the minimum protections afforded tenants and occupants under Section 235-f" (*id.* at

244). In this case, plaintiff does not argue that the Lease contains unreasonable occupancy limitation. Nor does he seek a reasonable accommodation under the New York State Human Rights law or the Americans with Disabilities Act. Nor does he argue that he has been deprived of his rights or minimum protections afforded under the applicable provision of the Roommate Law to having "one additional occupant." Notably, the appellate court also observed that "the purpose of section 235-f would be undermined" if the courts "permit landlords to use the statue as a sword against the very group it was designed to shield" (*id.* at 244). Here, it is plaintiff, not defendant, who seeks to use the statute as a sword, because he seeks a declaratory judgment that he is entitled to two roommates, in contravention of the limitation expressly set forth in section 235-f (3) of the Roommate Law. Therefore, the observation or concern raised in *Capital Holding* is inapposite to the facts of this action.

Further, it is noteworthy that, after *Capital Holding*, the appellate court, in a different case, affirmed the ruling of the trial court, that granted an injunction in favor of a cooperative apartment building, enjoined the tenant from having persons unrelated to her (other than one roommate) occupy the apartment, and directed all but one of the roommates to vacate the apartment (*Barrett Japaning, Inc. v Bialobroda*, 68 AD3d 474 [1st Dept 2009]). The appellate court remarked that, although the Roommate Law is "not intended to provide a remedy for landlords," a landlord could enforce a lease that is "consistent with the statute" (*id.* at 475, citation omitted). The appellate court also noted that there was no evidence that the tenant and her roommates were a "non-traditional family" having a long-term relationship "characterized by emotional and financial commitment and interdependence," such that the relationship would come within the meaning of the Roommate Law (*id.*, citation omitted). Here, plaintiff claims that he needs a second roommate as a live-in assistant, to help him with his daily chores and to

accompany him to medical appointments. Plaintiff's claimed relationship with the second roommate is likewise not within the meaning of the Roommate Law.

CONCLUSION

Based upon all of the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment seeking a dismissal of the complaint's first cause of action is granted only the extent of dismissing that portion which seeks a declaration that plaintiff is entitled to have a second roommate; and it is further

ORDERED that defendant's request, that its second affirmative defense and first counterclaim asserted in its amended answer, declaring that plaintiff is entitled to have only one roommate at a time, is granted; and it is further

ADJUDGED and DECLARED that, under the Lease, plaintiff is entitled to have only one roommate at a time; and it is further

ORDERED that counsel for the parties are directed to appear for a status conference in Room 304, 71 Thomas Street, New York, New York, on September 21, 2018 at 9:30 am to address any unresolved or other remaining causes of action of the complaint.

DATED: 9/5, 2018

New York, New York

J.S.C.
HON. MELISSA A. CRANE
J.S.C.